Takings and Transmission

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I. Introduction

A. My topic is current disputes over public use in eminent domain actions involving takings for interstate electricity transmission lines.

B. In the past this was a noncontroversial type of taking. Transmission lines are a classic public use like a highway or railroad line that benefits the public even though the impact may be borne more heavily by those in its path.

C. Now though, transmission lines are often built by private merchant companies, not public utilities, and are built in states with significant renewable energy resources, particularly wind, to provide power exclusively to other states. So one can argue there is no public use, or at least an in-state public use, to justify the taking.

D. What should states do when faced with a merchant line designed exclusively to bring power to neighboring states. Is it a public use?

II. Eminent Domain and Public Use

A. The Fifth Amendment states that private property shall not be taken for public use without just compensation. Most state constitutions have similar provisions.

B. Controversy over "economic development takings" as a public use led to *Kelo v. City of New London*, 545 U.S. 469 (2005).

C. State legislative reactions to *Kelo* reduced the ability of states and local governments to engage in economic development takings.

D. Are merchant transmission lines for renewable energy the newest form of controversial economic development takings?

III. **Renewable Energy and Transmission**

A. There is a significant push to development renewable energy, particularly wind energy, to reduce our dependence on fossil fuels to meet energy independence and climate change goals.

B. Most of the wind resource is in states with very small populations or in portions of states where the population is sparse.

C. That means we can't capitalize on these wind resources unless we significantly build out our transmission system to transport the resource to population centers.

D. The electricity transmission regulatory structure is very state-based in nature. Each state must approve interstate and intrastate power lines. FERC has little authority (unlike interstate natural gas pipelines when FERC has primary authority).

E. Is a line designed exclusively to bring power to neighboring states with no power provided to in-state residents in the "public interest" as defined by state statute? Is there a "need" for that line as is required to obtain certificates of need from state public utility commissions (PUCs)? Is such a line a public use under the state constitution or state statutory delegation for purposes of eminent domain authority?

IV. **State Disputes**

A. Siting, Permitting, and Eminent Domain for Transmission Lines

Public Utility Commissions

1. In most states, PUCs have statutory authority to grant "certificates of need" or "certificates of public convenience and necessity" to utilities and others that propose new intrastate or interstate transmission lines.

2. The criteria for a certificate generally include establishing there is a "need" for the new line and that the line is in the "public interest."

3. In most states, transmission lines are deemed a "public use" for purposes of exercising eminent domain authority and so once a person or entity obtains a certificate to build the line, it has the requisite authority to exercise the power of eminent domain if efforts to obtain voluntary easements for the line fail.

B. Must the line provide electricity to citizens of the state to be a public use and to obtain state PUC approval? Some states have authority dating back decades on this issue.

1. Virtually all states have found that interstate lines that provide power to in-state residents and out-of-state residents are a public use for purposes of eminent domain authority.

2. A few states have also found that an interstate line that provides no power to in-state residents is still a public use.

3. In other states, however, courts have found no eminent domain authority if the line will provide no power to in-state residents, even if it might improve overall grid reliability or provide power to in-state residents if demand increases in the future.

4. Yet in other states, the issue has been dormant until now, with the advent of merchant transmission and the push for renewable energy.

V. State Examples

A. North Dakota

1. Known as the "Saudi Arabia of Wind," North Dakota is ranked 2nd in the nation in terms of percentage of electricity derived by wind and top 10 for installed wind capacity and potential wind resource.

In North Dakota, utilities and private transmission companies have the power of eminent domain to construct transmission lines to provide power exclusively to out-of-state customers since at least 1976. In *Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519 (N.D. 1976), the North Dakota Supreme Court held that the state derives a public benefit from interstate transmission lines because the transmission lines increase the reliability of the electrical supply system in general, and the line could be altered in the future to supply power to North Dakota if demand existed.

2. Today, a significant amount of wind energy has been developed in North Dakota to serve renewable energy goals in Minnesota. Transmission lines have been built for this purpose and more such lines are in the planning stages.

B. Mississippi

1. In Mississippi, the state supreme court held in 1984 that although there is eminent domain authority for power lines, a company cannot exercise that authority to build a interstate line to serve customers in neighboring states.

2. In *Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107 (Miss. 1984), the state PUC granted a certificate of public convenience and necessity to a power company to build a 51-mile high voltage power line from Mississippi to Louisiana. Normally, that would allow the company the right of eminent domain to build the line.

3. The supreme court found no eminent domain authority for the line. It reasoned that the certificate exceeded the PUC's statutory authority because the line was interstate rather than intrastate and, more important, no Mississippi customer would be served by the transmission line.

4. The court seemed particularly influenced by the fact that Mississippi utility customers would pay the $23 million cost of the line as part of their rate base even though they would receive no direct benefit from the line.

C. Montana

1. In 2008, the Montana Department of Environmental Quality issued a Certificate of Compliance for a 215-mile merchant transmission line called the Montana Alberta Tie Line.

2. At the time, the relevant eminent domain statute provided that if the proposed line had obtained a certificate of compliance, which means it had been declared to be within the public interest, convenience, and necessity, then the line would be granted eminent domain authority.

3. In December, 2010, a trial court dismissed the company's condemnation action on grounds that there was no statutory or other authority granting the power of eminent domain to a merchant line.

4. MATL sought legislative assistance and in 2011 the legislature enacted HB 198, which made clear that transmission projects that received a certificate of compliance could exercise eminent domain authority.

5. The original lawsuit striking down the line's eminent domain authority was vacated by the Montana Supreme Court in 2011 as a result of HB 198. *MATL v. Salois*, 255 P.3d 158 (Mont. 2011).

6. There is a potential referendum to overturn the law in 2012.

7. There are also legal challenges to HB 198 based on the Montana legislature's limits on *Kelo*-type takings. The lawsuits argue that HB 198 violates due process because it prevents economic development takings in urban areas but allows them in rural areas where these interstate lines will be built.

D. Wyoming

1. In Wyoming, both public utilities and private companies are expressly granted the power of eminent domain for transmission lines.

2. It is well established, however, that there is no eminent domain authority for the siting, construction, or operation of wind farms because the state did not grant specific authority for wind turbines to exercise eminent domain.

3. So what to do about collectors systems – the small transmission lines that transmit power directly from a wind farm to a larger transmission line?

4. In 2010, the Wyoming legislature enacted a moratorium on eminent domain authority for collector systems as a result of public opposition to the perceived power of wind energy.

5. Other legislation proposed, but not enacted, would allow limited eminent domain authority for wind collector lines by requiring a wind energy company to obtain land through negotiation from 85% of affected landowners and then the additional 15% could be acquired through eminent domain. This is similar to the "forced pooling" used in the West for oil and gas resources.

6. Arguably, prior to the current dispute, collector lines already qualified for eminent domain authority under the general statute that grants such authority for "electric power transmission and distribution." However, the argument goes that since wind collector systems generally feed into larger transmission lines that are moving energy to large load centers outside of

Wyoming, a certificate may not be granted due to inadequate demonstration of "need."

VI. "Just Compensation" Issues **[I am just starting the research on this section and would LOVE comments]**

A. Just compensation under existing law

B. How to create economic incentives for states, counties, and landowners in connection with interstate transmission

1. Wind turbine siting model
2. Resource extraction model (Wyoming)
3. Taxes/payments over time instead of one-time easement payment
4. Necessary changes in state law?

VII. **Conclusions/Observations**